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H & ANOR v. W(F)(2)

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[ORIGINATING SUMMONS NO: AA 24F-21-04-2018]
20 JANUARY 2022

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Abstract – *Each parent of a child has an equal parental right to the child's guardianship. It follows that an act of infidelity on the part of the child's biological father leading to the child's birth cannot of itself deprive the said father of the guardianship, custody, care and control of the child. It must also follow that the wishes as expressed in the will of the child's deceased mother for the child to be taken care of by another family member, cannot override the wishes of the surviving biological father to be the guardian of the child.*

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FAMILY LAW: *Guardianship – Application for – Illegitimate child – Biological father's name not inserted in child's birth certificate as father – Child brought up by mother while biological father enjoyed access to child and provided maintenance – Child's mother passed away – Mother's will appointed sister (child's aunt) as guardian of child – Child's aunt restricted biological father's access to child – Whether wishes expressed in will of deceased mother override wishes of surviving biological father – Whether act of infidelity leading to birth of child deprive biological father of guardianship, custody, care and control of child – Whether biological father ought to be given guardianship, custody, care and control of child with reasonable access given to child's aunt – Guardianship of Infants Act 1961, ss. 10 & 11*

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FAMILY LAW: *Guardianship – Ex parte order – Child brought up by mother while biological father enjoyed access to child and provided maintenance – Child's mother passed away – Mother's will appointed sister (child's aunt) as guardian of child – Child's aunt restricted biological father's access to child – Child's aunt obtained ex parte order from High Court pertaining to guardianship, control and care of child – Whether High Court has jurisdiction to remove appointed guardian without setting aside ex parte order by another High Court – Guardianship of Infants Act 1961, ss. 10 & 11*

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This action centred on the right to have guardianship, custody, care and control of a child. The first plaintiff ('H') and the second plaintiff were husband and wife. H had an intimate relationship with M resulting in the child being conceived. When the child was born, H's name was not inserted into the child's birth certificate as the father. Despite the circumstances, the child was brought up by M and H enjoyed access to the child and provided

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maintenance. M passed away in 2016 and, before her death, M had made a will that her sister ('defendant') was to be appointed as the guardian of the child. It should also be noted that the parties were related with M, the second plaintiff and the defendant being sisters. Since her demise, the defendant and her parents had restricted H from having access to the child despite the plaintiffs making telephone calls and making personal visits to the defendant's residence. Through their solicitors, H wrote to the defendant seeking access to the child and the defendant replied that access would be allowed but restricted only to family gatherings and only if the defendant was present, with the caveat that H and his family were not to disclose to the child that H was the biological father. The defendant initiated an *ex parte* action at the High Court, pursuant to ss. 10 and 11 of the Guardianship of Infants Act 1961 ('Act') and successfully obtained guardianship, control and care of the child ('*ex parte* 2017 guardianship order'). When H was made aware of the *ex parte* 2017 guardianship order, the plaintiffs commenced this action against the defendant seeking: (i) a declaration that H was the biological father of the child; (ii) that H be given guardianship of the child; (iii) H be given custody, care and control of the child; and (iv) that the defendant be given reasonable access to the child; and (v) alternatively, if custody, care and control of the child was not awarded to the plaintiffs, that they be given access to the child on terms. Before this action was filed, H had obtained a declaration from the Court of Appeal that he was the biological father of the child.

Held (appointing H as sole guardian of child):

(1) There was the evidence by the second plaintiff that on the day before and on the day of M's demise, she informed and promised M that she would look after the child. This piece of evidence of a promise made to a dying person would strengthen her application made jointly with her husband, H, to have custody, care and control of the child. It was a piece of relevant evidence under s. 5 of the Evidence Act 1950 and ought to be added to the weight of the evidence in favour of the plaintiffs. However, to serve the welfare of the child as required by s. 11 of the Act, the following were also taken into consideration: (i) the social welfare report on the home of the plaintiffs, the care that H had given to his family and financial standing of both the plaintiffs would be in their favour; (ii) although the child expressed a wish to stay where he was, at tender age of seven, he would probably wish to be in a familial environment. This would be a good time for him to be transferred to the care of the plaintiffs rather than later when he would have formed longer roots in his current environment; (iii) the second plaintiff's testimony that the defendant was a person who was not able to manage finances well and was constantly in debt; (iv) the finances of the plaintiffs, in particular

A that of H was superior to the more modest means of the defendant and her husband. This gave the plaintiffs the edge to provide better for the physical, mental, social and educational needs of the child; (v) the location of residence, which would have important bearing on the issue of access; (vi) after M's demise, the plaintiffs' attempts to obtain access
B to the child were unsuccessful and the defendant remained obdurate. Such conduct did not give the court the confidence that the defendant would provide a suitable environment for the upbringing of a child. In the circumstances, the guardianship of the person of the child ought to be placed solely with H. (paras 54-56 & 58)

C **(2)** There was on foot the *ex parte* 2017 guardianship order and it was settled law that one High Court could not set aside a final order regularly obtained from another High Court of concurrent jurisdiction. However, with H having obtained a declaration from the Court of Appeal that he was the biological father of the child, this court was not powerless to
D award guardianship of the child to H in the face of the *ex parte* 2017 guardianship order. This court was by law enjoined to look after the welfare of the child by virtue of s. 11 of the Act and pursuant to s. 10, may at any time remove from his guardianship any guardian and may from time to time appoint another person to be the guardian in his place.
E (paras 59 & 62)

(3) H, who was the biological father and surviving parent had equality of parental rights to be the guardian to the child either alone or to act jointly with any guardian appointed by M, the deceased parent. By moving the court *ex parte* (in the *ex parte* 2017 guardianship order), the
F defendant had stolen a march on H when she ought to have named H as a party to the action. (para 60)

(4) The defendant was removed as the guardian of the person of the child. The custody, care and control of the child was awarded to the plaintiffs with immediate effect with access given to the defendant on the
G following terms: (i) uninterrupted access by way of telecommunication; (ii) physical access to the child on every alternate weekend with overnight access from 10.30am on Saturdays until 6pm on Sundays and during the second half of the school holidays; (iii) access to the child on every alternate Chinese New Year holidays from the eve of Chinese
H New Year, from 10.30am until 6pm of the third day of the Chinese New Year festival; (iv) access to celebrate the child's birthday on every alternate year from 5pm, the night before his birthday until 10am the day after his birthday. (para 65)

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Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener) [2020] 4 CLJ 731 FC ***(refd)***

Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran Dan Kematian Malaysia, Jabatan Pendaftaran Negara, Malaysia & Anor [2022] 1 CLJ 23 FC ***(refd)***

Shri Rohit Shekhar v. Shri Narayan Dutt Tiwari & Another LNIND 2010 DEL 1309 ***(refd)***

Legislation referred to:

Births and Deaths Registration Act 1957, s. 27
Child Act 2001, s. 8
Courts of Judicature (Amendment) Act 2020, s. 3
Courts of Judicature Act 1964, s. 15A
Evidence Act 1950, ss. 2, 5
Guardianship of Infants Act 1961, ss. 3, 4, 5, 6, 7(1), (2), 10, 11
Rules of Court 2012, O. 32 r. 6, O. 59 r. 6(c)

For the plaintiffs - Ong Chin Siong & Lydia Wong Sook Yoong; M/s Siong & Rita
For the defendant - Yap Yoon Jan; M/s Yap Siew Yee & Co

Reported by Lina E

JUDGMENT

Su Tiang Joo JC:

Introduction

[1] This action is centred on the right to have guardianship, custody, care and control of a child ("the child"). Bearing in mind the welfare of the child, the names of the parties are not set out.

[2] Under the will of the mother ("M") of the child, the defendant who was M's sister and is the aunty of the child was to be appointed as the guardian of the child.

[3] After a critical illness in 2015, M passed away in 2016. Since her demise, the defendant and her parents have restricted the first plaintiff ("H") who is the biological father of the child from having access to the child.

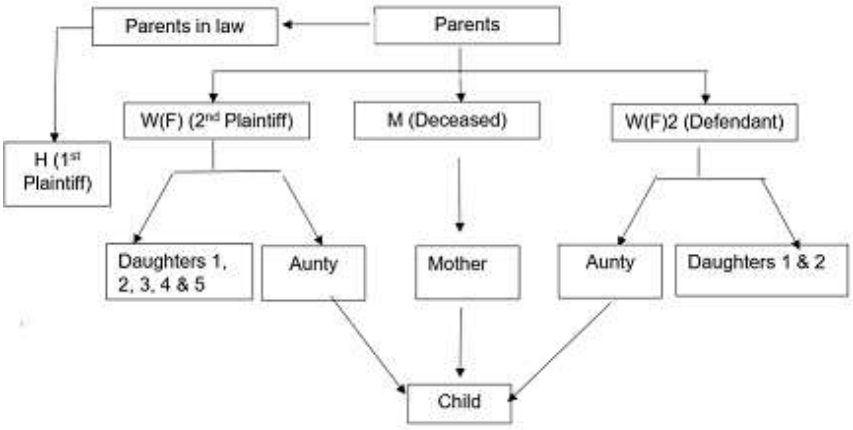
Order On Guardianship

[4] On 23 November 2021, this High Court ("court") ordered, *inter alia*, that M be removed as the guardian of the child and that H be appointed in her stead with liberal access to be granted to the defendant.

Appeal

[5] Dissatisfied, by notice of appeal (encl. 185) dated 20 December 2021, the defendant appealed to the Court of Appeal. Stated below are the court's grounds of judgment.

Parties



Parties explanatory notes:

(i) W(F) (second plaintiff), M (deceased) and W(F)2 (defendant) are sisters.

(ii) W(F) (second plaintiff) together with H (first plaintiff) have five daughters.

(iii) W(F)2 (defendant) together with her husband have two daughters.

(iv) The parents of W(F) (second plaintiff), M (deceased) and W(F)2 (defendant) are the parents-in-law of H (first plaintiff).

[6] H (first plaintiff) and W(F) (second plaintiff) are husband and wife and they reside in Selangor whereas the defendant resides in Perak.

[7] H had an intimate relationship with M and as a result of this relationship, the child was conceived and born when H was married to the second plaintiff.

[8] When the child was born, H's name was not inserted into the child's birth certificate as the father.

[9] Until M passed away, the child was brought up by M with H enjoying access to the child. He provided maintenance for the child until the demise of M.

Dispute

[10] After the demise of M, H's access to the child was obstructed by the defendant and her parents despite the plaintiffs making telephone calls and making personal visits to the defendant's residence.

[11] In December 2017, H through his solicitors wrote to the defendant seeking access to the child.

[12] The defendant replied through her solicitors *via* a letter dated 27 December 2017 saying that access will be allowed but restricted only to family gatherings and only if the defendant is present with the caveat that H and his family are not to disclose to the child that H is the biological father.

[13] H was not agreeable with the conditions imposed by the defendant. He felt that the access given was inadequate and the conditions imposed were uncertain. He could not bring himself to see the child being brought up thinking he is an orphan and not knowing who his father is. To his mind, the welfare of the child will be prejudiced if he is brought up under such a lie without the opportunity to know and to meet with his father.

[14] H also expressed doubt about the defendant's ability and means to look after the child's physical, mental, social, educational and financial needs as well as to provide a comfortable place of residence.

Ex Parte Order For Custody, Care And Control

[15] The defendant initiated an *ex parte* action pursuant to ss. 10 and 11 of the Guardianship of Infants Act 1961 (Revised 1988) ("Act 351"). These provisions are reproduced hereunder:

> 10. The Court or a Judge may at any time remove from his guardianship any guardian, whether a parent or otherwise and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place.
>
> 11. The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[16] The *ex parte* action with suit number AA-24NCvC-63-02-2017 resulted in an order made on 6 March 2017 by the His Lordship, Che Mohd Ruzima Ghazali J (now JCA) sitting in the High Court in Malaya at Ipoh granting guardianship, control and care of the child to the defendant ("*ex parte* 2017 guardianship order").

[17] H was only made aware of the *ex parte* 2017 guardianship order when a copy of it was enclosed with the letter in reply of 27 December 2017 from the defendant's solicitor stipulating the terms of access that the defendant was prepared to give. After discussing with his wife, the second plaintiff, both of them decided to apply for guardianship, custody and care of the child. H is most grateful that his wife had forgiven him and was ready to jointly look after the child.

This Action

[18] By this action, the plaintiffs sued the defendant seeking:

(i) a declaration that H is the biological father of the child;

(ii) that H be given guardianship of the child;

(iii) that the plaintiffs be given custody, care and control of the child;

(iv) that the defendant be given reasonable access to the child;

(v) alternatively, if custody care and control of the child is not awarded to the plaintiffs, that they be given access to the child on terms;

(vi) that there should be no order as to costs and such further or other relief as this Honourable Court may deem fit and just.

[19] The defendant opposed the plaintiffs' suit. She challenged H's claim that he is the biological father of the child. She deposed on affidavit that M was never married and the said child is illegitimate.

[20] The defendant exhibited the will of M which has a codicil and pointed out that it is expressly provided in the will that she was appointed by M to be the guardian of her infant child for as long as is required by law and if the defendant is unable or unwilling to act for whatsoever reason, then M's brother-in-law (husband of the defendant) is appointed to be the guardian.

[21] The defendant asserted that after the demise of M, the second plaintiff had told her off for allowing H to have access to the child at her residence and H had occasion to use violence to seek to secure access to the child necessitating her to secure assistance from the police. By reason thereto, she ceased to allow H from having access to the child.

[22] H was labelled by the defendant to be irresponsible and immoral for having an extra-marital affair with M who was the younger sister of the second plaintiff and wife of H.

[23] The defendant asserted that the *ex parte* 2017 guardianship order was obtained in fulfilment of the wishes of the late M as stipulated in the latter's will.

[24] The defendant asserted that this action was initiated to satisfy H's own desire to have a son as in his marriage to the second plaintiff, they have five children, all of whom are girls.

[25] In her affidavit in reply, the defendant asserted that the child is well provided for by M who had set up a family trust for the needs of the child. And, she further asserted that, in fact, she and the other members of her family were aware that the second plaintiff had sought to divorce H but was forcefully coerced by H to desist and the second plaintiff had informed her that it was in the interest of their five daughters that she (the second plaintiff) is still with H.

Paternity Issue

[26] The plaintiffs applied (encl. 9) for a Deoxyribonucleic acid (DNA) sample of the child to ascertain whether H is the child's biological father. Learned counsel for the plaintiffs, in support of the said application, placed reliance upon the Indian High Court (Delhi) authority of *Shri Rohit Shekhar v. Shri Narayan Dutt Tiwari & Another* LNIND 2010 DEL 1309, wherein mention was made of the Convention on the Rights of Child 1990, which expressly provides a right to knowledge of parenthood; reference was also made to laws passed in Sweden in 1985 and thereafter almost all of Europe passed laws giving the child the right to know of his or her biological antecedents and the High Court (Delhi) granted an order for samples to be taken for DNA testing pursuant to, *inter alia*, the Hindu Adoptions and Maintenance Act 1956, The Code of Criminal Procedure 1973, the Family Courts Act 1984 and the child's right to knowledge.

[27] This application (encl. 9) was heavily contested and was dismissed by the learned JC Mohd Radzi Harun (now a judge) on 27 November 2018. The plaintiffs appealed to the Court of Appeal. At the Court of Appeal in Civil Appeal No. A-02(IM)-2635-12-2018, an order was recorded on 12 December 2021, which ordered by consent that:

(i) the child is the biological child of H and M;

(ii) the plaintiffs will not request for the child to undergo a DNA test; and

(iii) no order was to be made as to costs. (encl. 150, pp. 30 to 32).

[28] Therefore, when this matter first came before me on 15 January 2021, the paternity issue had been resolved. Paternity and legitimacy are separate and distinct concepts and the mere registration of the father's surname does not render legitimate an otherwise illegitimate child, see *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener)* [2020] 4 CLJ 731 (FC).

[29] The plaintiffs and in particular H is fortunate that the Federal Court has recently handed down its decision in *Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran Dan Kematian Malaysia, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 CLJ 23 making it clear that a parent armed with a court order declaring him to be the biological father is entitled as of right to call upon the Registrar-General of Births and Deaths of the National Registration Department, Malaysia to carry out his statutory duty prescribed by s. 27 of the Births and Deaths Registration Act 1957 (Act 299) (Revised 1983) to have the birth certificate of the child corrected to reflect accurate information as regards the biological father, as required by the scheme of the said Act.

[30] With the paternity issue having been resolved, the authority of *Shri Rohit Shekhar v. Shri Narayan Dutt Tiwari & Another* (*supra*) although of interest, is no longer relevant and this court will proceed to deal with the issue of guardianship, custody, care and control of the child on the premise that H is the natural and biological father of the child.

Application To Have Action Converted To Writ Action

[31] On 15 January 2021, learned counsel for the defendant sought for the action to be converted to a writ action.

[32] Bearing in mind that this action was initiated in 2018, at a time when the child was only about four years old, with there on foot orders for access favouring the plaintiffs but which the defendant was alleged to have refused to comply resulting in committal proceedings initiated (encl. 148) against the defendant and with the child growing by the day, I suggested to learned counsel for the defendant that I am minded to fix the originating summons (encl. 1) for hearing but the defendant is at liberty to apply to cross-examine the deponents of affidavits already filed. In my view, converting the action to a writ action would not serve to have the action resolved justly, expeditiously and economically.

Application To Cross-examine The Plaintiffs And Committal Proceedings

[33] In due course, the defendant filed an application (encl. 145) to cross-examine the plaintiffs on their affidavits.

[34] Directions were given by this court for the exchange of affidavits and for written submissions to be filed.

[35] In the meanwhile, on 15 April 2021, the plaintiffs were given leave to commence committal proceedings against the defendant for refusing to comply with orders for access dated 2 July 2019, 24 October 2019 and 6 January 2020 wherein the plaintiffs were to have access to the child.

[36] Unfortunately, on 15 July 2021, the day for the hearing of the application to cross-examine the plaintiffs, the affidavit (encl. 146) filed in support of the application (encl. 145) was found to be defective as it was affirmed without a proper jurat. No corrective measures were taken despite notice having been given by learned counsel for the plaintiffs. Learned counsel for the defendant admitted that this was an oversight on his part.

[37] Nevertheless, in the exercise of my discretion, I had allowed the application to be argued without the aid of a supporting affidavit. After hearing the parties and with learned counsel for the defendant conceding that there will be no necessity to cross-examine the first plaintiff, I allowed the defendant's application to cross-examine the second plaintiff on her affidavits (encls. 3 and 8) but with costs of RM3,000 to be borne personally by the defendant's solicitor pursuant to O. 59 r. 6(c) of the Rules of Court 2012, which is reproduced hereunder:

6. Personal liability of solicitor for costs (O. 59 r. 6)

(1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any solicitor whom it considers to be responsible an order:

...

(c) directing the solicitor personally to indemnify such other parties against cost payable to them.

[38] I had allowed the second plaintiff to be cross-examined on her affidavit filed in support of the application for guardianship, custody, care and control of the child given the assertions made by the defendant that the second plaintiff:

(i) was not a willing party to this action;

A (ii) had sought to divorce H; and

(iii) would not accept the child into her home as the child would be a constant source of reminder of H's infidelity.

[39] In my opinion, in view of such assertions made against her, it would
B be best to hear from the second plaintiff herself on the assertions made against her and at the risk of repetition, her testimony given under oath and subject to cross-examination would serve to have the action resolved justly, expeditiously and economically without having to convert the action into a writ action.

C *Cross-examination Of Second Plaintiff*

[40] On 10 October 2021, the cross-examination of the second plaintiff was carried out with the aid of remote communication technology by reason of the COVID-19 pandemic. Proceedings by way of remote communication technology was made possible with the introduction of s. 15A of the Courts
D of Judicature Act 1964 (Revised 1972) (Act 91) *via* s. 3 of the Courts of Judicature (Amendment) Act 2020 (Act A1621), which came into force on 22 October 2020 (see PU(B) 530/2020). Section 15A provides:

15A. Court may conduct proceedings through remote communication
E **technology**

(1) Without limiting section 15, the Court may, in the interest of justice, conduct the proceedings of any cause or matter, civil or criminal, through a remote communication technology.

(2) In the case of the High Court, the place in which the High Court
F is held to conduct the proceedings of any cause or matter, civil or criminal, through a remote communication technology shall be deemed to be conducted within the local jurisdiction of such High Court.

(3) Nothing in this section shall affect the operation of section 5 of the
G Evidence of Child Witness Act 2007 [Act 676], sections 265A and 272B of the Criminal Procedure Code [Act 593] and section 32A of the Evidence Act 1950 [Act 56]. In this section, "place" includes cyberspace, virtual place or virtual space.

[41] The second plaintiff testified in Mandarin with the aid of the court's
H interpreter. A supervising solicitor engaged by the defendant was in attendance as an observer when the second plaintiff was giving her testimony.

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[42] Difficult questions were put forward to the second plaintiff about the first plaintiff's intimate relationship with M, her father's unhappiness with H over this relationship resulting in her father not wanting to see H, her not having a son and having made multiple requests to divorce H as a result of the extra-marital relationship between H and M.

[43] Thereafter, written submissions were filed and exchanged with decision scheduled for 1 November 2021. This was then re-scheduled to 23 November 2021 for the parties to take further instructions on having the matter resolved amicably, in particular, the issue on access but the parties could not come to terms.

Uncertainties In Life

[44] The defendant submitted that given the uncertainties and vagaries of life, it cannot be certain that the child will be better off with the plaintiffs. She asserted that the *status quo* of the environment in which the child is being brought up, which includes the family support and love given by her parents, who are the child's grandparents ought to be maintained.

[45] The defendant alluded to the possibility that the presence of the child in the plaintiffs' household may in fact disrupt the *status quo* in the plaintiffs' household as more love and attention may be showered upon the child at the expense of the other children.

Law On Guardianship

[46] Section 5 of Act 351 provides for equality of parental rights to both the father and mother.

[47] Section 6 of Act 351 provides for the rights of a surviving parent on guardianship, which is particularly relevant to this action, is reproduced here:

> (1) On the death of a parent of an infant, the surviving parent, if any, shall, **subject to this Act**, be guardian to the infant either alone or jointly with any guardian appointed by the deceased parent, and:
>
> (a) if no guardian has been appointed by the deceased parent; or
>
> (b) in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent, the Court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent.
>
> (emphasis added)

[48] What is clear from the provisions of s. 6 of Act 351 is that the rights of the surviving parent and that of any guardian appointed by the deceased parent is subject to the provisions of Act 351. And, for ease of reference s. 10 of Act 351 is reproduced here:

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> The Court or a Judge may at any time remove from his guardianship any guardian, whether a parent or otherwise and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place.

[49] Pursuant to s. 11 of Act 351 in dealing with the issue of guardianship,
B this court is required to have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[50] Hence, applying the law pursuant to the provisions of Act 351, both H as the surviving parent and the defendant as the guardian appointed by M,
C the deceased parent, would be joint guardians of the child. In my considered view, Act 351 does not bar any parent of an illegitimate child from exercising parental rights.

[51] From the narration of the facts, it is clear that the defendant and the first plaintiff do not get along and it would not serve the welfare of the child
D for them to act jointly as guardians of the person of the child. In summary, the following facts would stand in their way acting jointly as guardians of the person of the child:

(i) the defendant is obstructive to the plaintiffs' efforts to have access to the
E child;

(ii) until legal action was initiated by H, the defendant would not even wish for the child to acknowledge that the first plaintiff is the biological father who is lawfully entitled to have equal parental rights of guardianship;

(iii) the defendant harbours feelings of unhappiness with the first plaintiff
F over his infidelity; and

(iv) both of them reside in different States, one in Perak and the other in Selangor.

Court's Analysis And Findings

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[52] It is, therefore, apparent that in this action, this court is tasked to exercise its powers pursuant to s. 10 of Act 351 to remove one of them and for the other to be the sole guardian of the person of the child. I lay emphasis on the term "guardian of the person" of the child because separate duties are provided under Act 351 for a "guardian of the person" and a "guardian of
H the property" of the infant, see ss. 3 and 4 of Act 351, which are reproduced below:

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Duties of guardian of person

3. The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

Duties of guardian of property

4. Subject to the rights and powers of any trustee or personal representative in whom an infant's property is vested, a guardian of property of an infant shall have the control and management of the infant's property, and shall deal therewith as carefully as a man of ordinary prudence would deal with his own property, and may, subject to this Act, do all acts which are reasonable and proper for the realisation or protection of the infant's property.

[53] The wishes of the parents of the child are not *ad idem*. The asserted that M speaking through her will had appointed her to be the guardian. By this action, H wished to be appointed as the guardian and that both the plaintiffs be awarded custody, care and control of the child. With respect, in my opinion, subject to the primary concern, that is, the welfare of a child, the wishes of a surviving parent who is capable, who loves and who wants to look after his or her child ought to prevail.

[54] There is also the added evidence given by the second plaintiff that on the day before and on the day of M's demise, she informed and promised M that she (the second plaintiff) will look after the child. This piece of evidence of a promise made to a dying person would strengthen her application made jointly with her husband (H), to have custody care and control of the child.

[55] It is a piece of relevant evidence (see s. 5 of the Evidence Act 1950 (Act 56)) and ought to be added to the weight of the evidence in favour of the plaintiffs. This piece of oral evidence came from the second plaintiff during her cross-examination by learned counsel for the defendant and, therefore, it is not evidence on affidavit. If it had been then the provisions of the Evidence Act 1950 would not apply, see s. 2 of the Evidence Act 1950.

[56] Be that as it may, as is required by the provisions of s. 11 of Act 351, I proceeded to consider all the other materials presented to this court to arrive at a decision, which in this court's opinion, would primarily serve the welfare of the child. In this regard, the following were taken into consideration with no particular order of importance:

(i) Reports by social welfare officers. Two separate social welfare reports arising from separate interviews carried out by different officers who are "protectors" (see s. 8 of the Child Act 2001 (Act 611) were presented; one on the plaintiffs and another on the defendant. The individual reports have no adverse findings against either the plaintiffs

A or the defendant. These reports suggest that both the homes of the defendant and the plaintiffs would be adequate for the upbringing of the child. The protector's report on the defendant stated that she used to sell noodles but has given it up to look after the child. From my perusal, the report on the home of the plaintiffs, the care that H has
B given to his family and the financial standing of both the plaintiffs would be in their favour. The report by the protector on the plaintiffs confirms that the second plaintiff was initially unhappy with the relationship between H and M and that her relationships with them were troubled and cold but that she came to accept it and had
C reconciled with M before M's demise and that she supports H's efforts in this action as she herself loves the child. From the social welfare report on the plaintiffs, the five children of the plaintiffs have no objections to the child staying with them and are happy if he can. The social welfare officer cum protector concluded by supporting the
D application of the plaintiffs provided that H is the biological father of the child on the premise that H is a firm but loving family man providing the best for his family's needs.

(ii) Interview with the child. I had occasion to interview the child in the presence of the court's interpreter. The child was well dressed. He was
E shy but did not display any anxiety. He looks well taken care of and when asked, expressed a wish to stay where he is. However, I am conscious that at seven years of age, he is of tender age and would probably wish to be in a familial environment.

(iii) Testimony of the second plaintiff. Despite the emotionally charged
F and troubling questions that were put forward to her, she answered them clearly and calmly, giving me the impression that she has forgiven her husband, that she very much wants to embrace and bring up the child as her own with plans in the pipeline to formally adopt the child although she has five other children – three of whom are in
G their 20s, one is 17 years of age and the youngest is of the same age as the child. She expressed plans for the child to go to the same school as the youngest child, with all the girls having known the child and having had frequent contacts with him prior to the demise of M. The second plaintiff's testimony did not assist the defendant. Instead, she
H disagreed with the assertions put to her during cross-examination. And, from her testimony, the defendant is a person who is not able to manage finances well and is constantly in debt.

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(iv) Location of residence. The plaintiffs reside in Selangor whereas the defendant resides in Perak. This has an important bearing on the issue of access, and will be made clear by the terms of access that I have formulated for the parties.

(v) Financial well-being. From the social welfare reports, the finances of the plaintiffs, and in particular, that of H is superior to the more modest means of the defendant and her husband who have two daughters, aged 20, 18 years of age who are working in modest employment in another State. This gives the plaintiffs the edge to provide better for the physical, mental, social and in particular the educational needs of the child who by reason of his ethnicity would find it very challenging to obtain the benefit of the resources of the State in the field of education as he grows and matures.

(vi) Obstruction in access. After the demise of M, the plaintiffs' attempts to obtain access to the child despite being armed with orders of the court were unsuccessful and the defendant remained obdurate. Such conduct does not give this court the confidence that the defendant will provide a suitable environment for the upbringing of a child especially the social necessity of having to integrate into a society governed by the rule of law.

(vii) The love of a father. The defendant is not the child's biological parent and has two of her own children. On the other hand, H has the support of his wife, he is the biological father of the child and this gives him the advantage of having the natural and intuitive desire to do what is best for his own child.

(viii) Age of the child. With the child being of a tender age of seven and just starting formal schooling, this would be a good time for him to be transferred to the care of the plaintiffs rather than later when he would have formed longer roots in his current environment.

(ix) Provision by M. The defendant asserts that M had made provision for the financial needs of the child but no particulars beyond this bare assertion were given.

(x) Uncertainties in life. With due respect, this is a given. I had deferred giving my decision so as to afford the parties the opportunity to come to terms on how best to bring up the childbearing in mind the wisdom housed within the proverb attributed to several African cultures that "it takes a village to raise a child" – wisdom which I endorse. However, with the parties to this action being unable to do so, the court will have to discharge its duty and decide in accordance with the

law and in the process, balance their competing interests against the welfare of the child, see *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ Rep 182 (HC).

[57] If I may, with respect, distil what was said by Her Ladyship Mary Lim FCJ in *Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran Dan Kematian Malaysia, Jabatan Pendaftaran Negara, Malaysia & Anor* (*supra*) at para. [71]: "The beginning of life, the arrival of a new-born should be celebrated with joy and a sense of well-being ... without casting any moral judgment, the practice of cohabitation." And, I would add that the defendant's attempt to police the morality of H ought not to obstruct this court from doing what would best serve the welfare of the innocent child.

[58] In the circumstances, in my view the guardianship of the person of the child ought to be placed with H.

Ex Parte Guardianship Order Revisited

[59] However, there is on foot the *ex parte* 2017 guardianship order and it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction, see *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 (FC).

[60] The plaintiffs could have applied for the *ex parte* 2017 guardianship order to be set aside pursuant to O. 32 r. 6 of the Rules of Court 2012. Alternatively, the *ex parte* 2017 guardianship order could be the subject of a collateral attack on the ground that it was most probably obtained by the defendant without alerting the court of the existence of H who is the biological father and she ought to know that by reason of the provisions of ss. 5 and 6 of Act 351, H, as a surviving parent has equality of parental rights to be the guardian to the child either alone or to act jointly with any guardian appointed by M, the deceased parent. That the defendant would not have informed the court about H when applying for the *ex parte* guardianship order in 2017 would be a certainty as she had contested the paternity of H in this action filed in 2018. By moving the court *ex parte*, the defendant had stolen a march on H when she ought to have named H as a party to the action in which she obtained the *ex parte* 2017 guardianship order.

[61] However, the plaintiffs did not launch any collateral attack against the *ex parte* 2017 guardianship order beyond stating that it was one obtained without their knowledge.

[62] With H having obtained a declaration that he is the biological father of the child pursuant to the Court of Appeal order dated 12 December 2021, is this court still powerless to award guardianship of the child to the first plaintiff in the face of the *ex parte* 2017 guardianship order? In my considered

view, it is not. This is because this court is by law enjoined to look after the welfare of the child by virtue of s. 11 of Act 351 and pursuant to s. 10 thereof the court may at any time remove from his guardianship any guardian and may from time to time appoint another person to be the guardian in his place.

[63] Wherefore, acting pursuant to s. 10 of Act 351, I accordingly removed the defendant as the guardian of the person of the child and in her place appoint the first plaintiff as the guardian of the person of the child. Although evidence was given by the second plaintiff when she was subjected to cross-examination that the defendant is not capable in managing finances, the issue of whether she (the defendant) ought to be removed as a testamentary guardian of the property of the child was not a live issue before the court and by reason thereto, I refrain from making any order on this issue. In any event, to my mind the default position in managing the property of the child as provided in sub-ss. 7(1) and (2) of Act 351 would serve to deal with this issue. Sub-sections 7(1) and (2) are reproduced here:

> (1) **A parent of an infant may by deed or will appoint any person to be guardian of the infant after that parent's death.**
>
> (2) **Any guardian appointed under subsection (1) shall act jointly with the surviving parent**, if any, but if:
>
> (a) the surviving parent objects to the guardian so acting; or
>
> (b) the guardian considers that the surviving parent is unfit to have the custody of the infant,
>
> the guardian may apply to the Court and the Court may:
>
> (aa) refuse to make any order (in which case the surviving parent shall remain the sole guardian of the infant);
>
> (bb) make an order that the guardian shall act jointly with the surviving parent; or
>
> (cc) make an order that the guardian shall be the sole guardian of the infant.
>
> (emphasis added)

Transition

[64] With the view to easing the child into a new environment in the home of the plaintiffs and bearing in mind that the defendant has had the care of the child for five years after the demise of M, that the plaintiffs are fortunate to have better resources, and that a bigger pool of resources in the form of a bigger family should ideally be made available. I ordered that the defendant is to be given liberal access with the transporting of the child for access to

A be managed by the plaintiffs. Parties are given liberty to approach the court should there be any material change in the circumstances that require a variation to the terms of the order made.

Conclusion

B **[65]** The defendant is removed as the guardian of the person of the child, H is appointed the sole guardian of the person of the child, the custody, care and control of the child is awarded to the plaintiffs with immediate effect (from the date of the order of 23 November 2021) with access to be given to the defendant on the following terms:

C (i) uninterrupted access by way of telecommunication;

(ii) physical access on every alternate weekend with overnight access from 10.30am on Saturdays until 6pm on Sundays and the plaintiffs are required to send and pick up the child from the defendant's residence effective Saturday, 4 December 2021;

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(iii) the defendant shall be granted access to the child during the second half of the school holidays commencing December 2021 and the plaintiffs are required to send the child to the defendant's residence and to pick him up thereafter;

E (iv) the defendant shall be granted access to the child on every alternate Chinese New Year holidays from the eve of Chinese New Year from 10.30am until 6pm of the third day of the Chinese New Year festival and the plaintiffs are required to send and pick up the child from the defendant's residence. This condition is to take effect on the year 2023

F onwards;

(v) the defendant shall be granted access to celebrate the child's birthday on every alternate year from 5pm the night before his birthday until 10am the day after his birthday commencing from 2022 onwards and subject to any school commitments; and

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(vi) parties are at liberty to apply.

[66] After hearing learned counsel for the defendant that he was representing the defendant *pro bono* and giving the benefit of the doubt that her obstinacy was due to her wanting to carry out what she genuinely thought

H were the wishes of M, and with the plaintiffs being in a better financial position, I decided that costs of RM5,000 subject to allocator be awarded to the defendant and to be borne by the plaintiffs. However, so as to ensure that the court does not act in vain, a consequential order was made allowing the plaintiffs to have the assistance of the Royal Malaysian Police in carrying into effect the order made by this court.

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Postscript

[67] After the disposal of encl. 1, the plaintiffs magnanimously sought leave of this Honourable Court to withdraw the substantive committal proceedings (encl. 148) against the defendant and the same was ordered to be struck out with no order as to costs. In the circumstances, the defendant should consider herself very fortunate to have benefited from the compassion shown by those in the administration of justice.